IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 55.

ANDREW C. KEELY, TRUSTEE, AND RICHARD K. PAYNTER, PLAINTIFFS IN ERROR,

vs.

JOSEPH H. MOORE; EDWARD J. STELLWAGEN AND THOMAS M. GALE, TRADING AS THOMAS J. FISHER AND COMPANY; MARY CECILIA THOMSON, AND GEORGIANA HAWKES THOMSON, DEFENDANTS IN ERROR.

Brief on Behalf of Defendants in Error.

Statement of Case.

This is an action of ejectment brought by Andrew C. Keely, styling himself as "trustee," and Richard K. Paynter to recover ninety-one one-hundreths of a part of a certain lot in the city of Washington, District of Columbia. The original defendants were the real estate agents and the party in possession. Mary Cecilia Thomson and her sister were made defendants upon motion, they being the life tenants under the will of William Thomson, jr. The plaintiffs are strangers to the blood of William Thomson, they having obtained a pretended title to the property by deed made the 22d day of March, 1899, by certain persons claiming to be

heirs of William Thomson, Jr. The deed recites that William Thomson, Jr., *died intestate as to the hereinafter described real estate.* The plea of "Not Guilty" having been filed and issue joined, the case came on for trial. By a stipulation it was admitted that William Thomson died in the year of 1887, seized of the property involved in the suit, and that the grantors in the deed mentioned were some of the heirs of William Thomson, and that the parties in possession were in possession under the will of William Thomson.

Thereupon the plaintiffs rested.

The defendants, in order to prove their case, the original will of William Thomson being of record in the Probate, Divorce, and Admiralty Division of the High Court of Justice, London, England, not being able to produce it in court, took certain depositions, the substance of which will be considered in the argument. After reading the depositions and producing not only a certified but an examined copy of the will, which had been compared by the witnesses who testified, and also by two of the subscribing witnesses to the will, and upon proof of the due execution of the will by two witnesses and proof of the death of the other subscribing witness and proof of his handwriting, the court admitted the will in evidence. The plaintiffs' attorney objected, and their objections are set out at large on page 26 of the printed record. Testimony was taken in rebuttal and surrebuttal as to the testamentary capacity of William Thomson at the time that he made the will. It was also claimed that there was certain testimony to show undue influence. The plaintiffs in the trial court also offered in evidence a copy of the will of William Thomson, Jr. (Rec. p. 49). As the record does not purport to contain all of the testimony in the case, it is not necessary for us to consider the testimony except in so far as plaintiffs' exceptions go to the ruling of the court as to admissibility of certain testimony which appears in the record. After

the testimony was in certain prayers were granted for the defendants and for the plaintiffs, and some of the plaintiffs' prayers were refused. The record on page 61 shows certain exceptions taken by the plaintiffs to the refusal of the granting of certain prayers offered by them. The record also shows, on page 56, plaintiffs objected to the granting of certain prayers which were granted by the court on behalf of the defendants. The record fails to show the reason why the plaintiffs excepted to any ruling of the court upon the evidence, except to the admission of the will in evidence, or to any of the defendants' prayers, and it also fails to show any reason why an exception was noted to the ruling of the court in refusing any of the prayers offered on behalf of the plaintiffs.

Thereupon the court charged the jury at length, and when the court had delivered its charge and before the jury retired, plaintiffs' counsel stated to the court *that they had no exceptions to the charge.* The jury thereupon retired and returned a verdict for the defendants.

The plaintiffs thereupon filed a motion for a new trial, the motion being set out on pages 73 and 74 of the record. Pages 73 to 130 of the record embrace proceedings had in the trial court on the motion for a new trial. Judgment having been entered on the verdict, the plaintiffs appealed to the Court of Appeals of the District of Columbia, and that court, on the 6th day of May, A. D. 1903, affirmed the judgment of trial court and plaintiffs then sued out a writ of error to this court.

ARGUMENT.

Before taking up and considering the questions of law involved in this case, we will briefly refer to the facts as contained in the record.

The plaintiffs in error appear to be land speculators attempting to get possession of a valuable piece of property

that was devised to Mary Cecilia Thomson and Georgiana Hawkes Thomson, the nearest living blood relations of the devisor, William Thomson, jr. In the deed under which plaintiffs claim title one of them is called "trustee" and the other one takes title in his own right, and the property is conveyed to them by certain heirs of William Thomson, jr., for the sum of $10. From this deed it would appear that the attack made upon the mental capacity of William Thomson, jr., to make his will, as well as the undue influence pretended to be set up in the record, *was an afterthought, as the deed recites not that William Thomson died testate, but that he died intestate as to the particular piece of property in the District of Columbia,* and the record shows that some of the grantors, or the ancestors of the grantors, received large sums of money under this very will. The record, as before stated, does not disclose all of the testimony in the case, but from what little appears in the record it is apparent that these two speculators are trying to defeat the will of William Thomson, jr. From this it would appear that these plaintiffs are entitled to no more favorable consideration of their case in this court than it is absolutely necessary under the law to give to them, for they have no equity in their apparent title.

In considering the questions of law that are raised by the plaintiffs in error, instead of considering each assignment of error as plaintiff has set them out, we will first take up and consider the assignments of error and exceptions taken to that part of the testimony which was given for the purpose of proving a proper execution of the will of William Thomson, and in doing that it will be necessary for us to consider the exceptions taken to the admission of this will in evidence; as well as those assignments of error and exceptions which are taken to certain portions of the depositions of the witnesses produced on behalf of the defendants, and then we shall take up and consider those assignments of error which refer to the exceptions noted to the ruling of

the court on certain testimony offered on behalf of the plaintiffs in error in rebuttal; and lastly, we shall consider those assignments of error that relate to the ruling of the court on the granting or refusal of certain prayers.

1. The assignments of error and exceptions taken to the ruling of the court on the evidence offered by the defendants in error to prove the due execution and contents of the will of William Thomson, and the exception taken to the admission of the will in evidence.

In considering this proposition we will cover the first six errors assigned by the plaintiffs in error in their brief. An examination of the record will show that all of the testimony contained in the record from pages 7 to 26 was offered for the sole purpose of proving that William Thomson died testate as to the part of his property situated in the District of Columbia; the original will itself, as before stated, was of record in England and could not be produced. From the testimony it would appear that the will was executed in duplicate, but that there was no evidence to show where the other copy was other than that it had been sent, after the death of William Thomson, to New York. The first thing that confronted the defendants in error was, how to prove the original will of William Thomson and have before the court sufficient evidence to show not only its *due execution*, but also its contents.

Following the decision of this court in the leading case of Robertson *vs.* Pickerel, 109 U. S., page 608, depositions were taken in England, not only of all of the living witnesses to the will, but of the person who had, at the time the depositions were taken, the custody of the original will, as well as proof of the handwriting of the deceased witness. And not only was a certified copy of the will attached to the depositions, but that copy was compared with the original on file in England by the witnesses to the will as well as the the custodian of the will; and appellees went a step further and had photographed the disputed certificate which

appeared on the second page of the will of William Thomson, and which is fully set out in the record, page 26, and which is fully identified and referred to in the testimony on pages 18 and 19 of record. By the Statute of Victoria only two witnesses were necessary for a will in England, and these witnesses must sign, not only in the presence of the testator, but in the *presence of each other*, and therefore, in the original probate of the will the certificate of John H. Cooksey, the third witness, was omitted therefrom, because not only was it not necessary to have such witness under the law of of England, but on account of the further reason that, according to the testimony, Cooksey did not subscribe as a witness in the presence of the other two, the other two subscribing on the 24th day of February, 1886, and Cooksey attaching his signature thereto on the 25th day of February, 1886.

Before the hearing of this cause in the Court of Appeals, counsel for the defendants in error were furnished with a copy of the assignment of errors used by the plaintiffs in error in that court, which assignment of errors was the same as the assignment in this court, but counsel were at a loss to know upon what grounds the plaintiffs in error excepted to the questions and answers contained in the depositions of Pritchard, Parker, Venn and Lyte. No reason for the exceptions is stated in the record and counsel were surprised when, examining the brief of the plaintiffs in error in the Court of Appeals, they discovered that plaintiffs were going to contend that the will which appears on page 24 of the record and the certificate attached thereto, contained on page 26 of the record, were not the will and certificate referred to in the depositions of the witnesses taken in London for the sole purpose of proving the will and the certificate thereto. This contention was based upon the fact that the bill of exceptions did not refer to these two papers as the exhibits mentioned in the depositions, and counsel, in considering the assignment of errors, attempted

to have the Court of Appeals believe that these two papers as well as "J. D. V. No. 3" crept into the record as independent evidence and had nothing whatever to do with the depositions. Counsel for the defendants in error immediately upon discovering the action of counsel who represented the appellants in the Court of Appeals, believing that an attempted fraud was about to be perpetrated upon the court on account of the fact that these two papers were not designated as the exhibits referred to in the depositions, immediately applied to the court below and showed to that court what the plaintiffs were attempting to do in the Court of Appeals of the District of Columbia. The Justice of the Supreme Court of the District of Columbia thereupon signed an order designating the several papers as the exhibits referred to in the several depositions, and corrected the bill of exceptions as prayed for in the motion of the defendants in error. Thereupon defendants in error applied to the Court of Appeals for the writ of certiorari to bring that record before them, but the Court of Appeals, in the case of Keely et al. *vs.* Moore et al., 22 App. D. C., page 1, held that they had no authority to grant the writ of certiorari, and the case was heard by the Court of Appeals upon the same record that we have here before this court. All of the testimony of the witnesses heretofore named was objected to in the Court of Appeals on the sole ground that the two papers here referred to were not the ones offered in evidence, and therefore the testimony was immaterial and irrelevant. No such objection appears in the record, nor does any such objection appear when counsel objected to the introduction of the papers. An examination of the record will show that the depositions fully identify the will offered in evidence, as well as fully identifying the certificate on page 26. In fact, on pages 18 and 19 of the record, Robert Albion Pritchard not only identifies the exhibits, but *reads in full the certificate made by Cooksey, which he says was annexed to the will of William*

Thomson. As far as the will itself is concerned, not only was it fully identified by all the witnesses who were examined in regard to its proper identification, but it was compared, according to the testimony of all the witnesses, with the original will of William Thomson on file in the English court, and on page 49 of the record the plaintiffs in error themselves offered in evidence a copy of the will of William Thomson, which copy is exactly the same as the copy offered in evidence by the defendants in error, except in this, that there was not added thereto the certificate of Cooksey, which was photographed by the defendants in error, and it is also certified to by a registrar. Defendants in error therefore contend that this court will hardly permit the plaintiffs in error to impose upon them in contending that the will and photographed copy referred to in the depositions was not the will and certificate that was offered in evidence, and which appear in the record.

The justice who tried the case as shown in the case of Keely *vs.* Moore, heretofore referred to, identifies these papers as the ones referred to in the depositions, and the Court of Appeals treated this contention of plaintiffs in error as untrue, for in their statement of the case, which will be found on page 136 of the record, they say:

> "The defendants thereupon proceeded to prove the will of William Thomson. The original, probated in London and retained in the registry of the court there, *was not available to be produced upon this trial;* and recourse was had to secondary proof of its execution and contents. Two of the witnesses, Lomer and Linthorne, were yet living and their testimony was taken by deposition. It is sufficient to say, in regard to this testimony, that the witnesses testified fully and unequivocally to the due execution of the will in their presence and their attestation of it, and to the mental capacity of William Thomson at the time to make it. Lomer and Linthorne also testified to the writing of the added certificate in their office. John H. Cooksey, the vice-consul, had died in 1895;

but his son, who was examined as a witness by deposition, testified to the genuineness of his father's signature attached to the certificate. He also testified that he knew William Thomson well; and, that in February of 1886, when Thomson came to see his father about the will, he was perfectly sane and in good health.

"The contents of the certificate attached to the will were stated by one of the registers of the probate office who had the custody of it, and were set forth in his deposition verbatim from the original paper. A photographic copy of it was also proved by him and others, and was admitted in evidence, although objected to by the plaintiffs. This same witness also testified to the correctness of a certified copy of the will and which was annexed to the interrogatories propounded to him, marked "J. D. V. 2," and he stated that he had compared it with the original will and that it was correct, word for word, and in every particular. And this paper also was admitted and read in evidence over the objection of the plaintiffs. An identically similar copy was subsequently introduced in evidence by the plaintiffs themselves in rebuttal. This was substantially the case made for themselves by the defendants."

We will now take up each witness and consider his testimony in order.

Robert Albion Pritchard, a witness whose testimony is objected to, was, at the time that he testified, one of the registrars of the Probate, Divorce, and Admiralty Division of the High Court of Justice, England, and a doctor of the civil law, residing at Somerset House, Strand, London, England. The duties of his office were not only to have the custody of wills, but also to examine and certify to wills as one of the registrars; and he testified that there was a paper on file purporting to be the will of William Thomson, which paper had been probated in that court and was of record therein. He then identified the photographed copy of the attestation clause signed by Cooksey, and also identified the certified

copy of the will which accompanied the depositions, and which was the copy that was offered in evidence, and he stated that he compared it with the original will, and that it was correct, word for word, in every particular.

William G. Parker, whose testimony is objected to, testified that he was a photographer, residing in London, England, and that he photographed the exhibit which was offered in evidence, and he said that it was a facsimile copy of the certificate as it appears on the original will of Wm. Thomson, jr., and that the photograph was made by him; that the will was brought to his office by Mr. John Venn, accompanied by an officer of the High Court of Justice, and that it was there photographed by him.

John Dalton Venn, whose testimony is objected to, testified that he was present when the photograph of the attestation clause signed by Cooksey was made by the photographer, and he identified the exhibit as being a true copy of the original.

William Maxwell Lyte testified that he is a churl servant, employed as clerk in the Probate Registry, Somerset House, and that he took the original will of William Thomson, bearing date February 26, 1886, to the photographer's, Mr. Parker's, and there the same was photographed, and he identified the exhibit which appears on page 23 of the record.

After these interrogatories were read, the defendants offered in evidence the will of William Thomson, together with the photographed copy of the certificate of Cooksey, which will appears on pages 24 to 26 of the record, and plaintiffs objected, stating, on page 26 of the record, certain specific objections to the offering of the will in evidence. The trial court admitted the will as prima facie evidence of the fact that William Thomson devised the property mentioned in the declaration in ejectment, but when the case was finally submitted to the jury the question of whether or

not the will was duly executed was left to the jury to decide.

We will therefore consider whether or not the trial court was warranted, on the testimony here produced, in admitting the certified and examined copy of the will of William Thomson, after its proof as set out in the interrogatories, in evidence against the specific objections set up by plaintiffs, and that brings us to consider the question of the manner of proving a will in this District. In taking the testimony as they did, counsel were guided in a great measure by the decisions of this court. In the case of Robertson *vs.* Pickerel, before referred to, the Supreme Court of the United States, in considering the will in that case, which was on file in a court of record in Virginia, say:

> "The question still remains—is the instrument sufficient to pass title to real property in the District of Columbia? If so, it should have been produced and proved in the manner mentioned. If, as stated by counsel, it is on file in the Hustings Court, and by the law of Virginia can not be removed, then it should have been proved under a commission as other instruments out of the city are proved when it is impossible to compel their production in court."

On the question of submitting secondary evidence it would seem that under the decisions of the Supreme Court of the United States proof of written instruments being outside of the jurisdiction of the court would be sufficient to warrant secondary evidence of their contents. In the case of Burton *vs.* Driggs, 20 Wallace, p. 134, the Supreme Court, speaking of this question, say:

> "In the present case the witness lived in one State and more than 100 miles from the place of trial. The process of the court could not reach him. For all jurisdictional purposes he was as if he were dead. It is well settled that if books or papers necessary as evidence in a court in one State be in the possession of a person living in another State, secondary evi-

dence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary."

See, also—

Shepherd *vs.* Giddings, 22 Conn. 282.
Brown *vs.* Wood, 19 Mo. 475.
Whilden *vs.* Merchant Company, 64 Ala. 30.
Binney *vs.* Russell, 109 Mass. 56.

Thus, it is well settled, that in order to prove title to real property the will must be produced in court and evidence given of its due execution; but if the will be lost or can not be produced, the proof must be made by secondary evidence of its execution and contents. Its genuineness must be shown by the witnesses, if they are living, who attested its execution and heard the declaration of the testator as to its character, *and if dead, their handwriting must be proved.*

Robertson *vs.* Pickerel, 109 U. S. 608.
McCormick *vs.* Sullivant, 10 Wheat. 192.
Darby *vs.* Mayer, 10 Wheat. 465.

It is a well-settled principle of law that a will may be proved by a certified copy, provided that you give in evidence some testimony of its due execution, or show that it is impossible to prove that fact.

Hall *vs.* Giddings, 2 Har. & J. 112.
Smith *vs.* Steele, 1 Har. & McH. 419.

The principal objection made to the admission of the will in evidence in the trial court was that it was not properly executed to pass real estate under our law; that the certificate of Cooksey was not a sufficient attestation of the instrument within our law. Upon an examination of the authorities it will be found that under the Statute of Frauds no attestation clause is necessary in order to

establish the fact that the witnesses signed in the presence of each other. All the Statute of Frauds requires is that the witnesses should be present as witnesses and see the will signed by the testator, and that it should be subscribed by them in the presence of the testator, and they should subscribe their names upon the will in his presence, but that it is not necessary that the witnesses should sign in the presence of each other. This was settled in our jurisdiction in the case of In re Porter Will, 20 D. C. 493, and is supported by the following authorities:

Roberts *vs.* Phillips, 4 Ellis & Blackburn, 451.
Welty *vs.* Welty, 8 Md. 15.

But it is said that, notwithstanding this fact, there is no evidence that William Thomson, Jr., was present when John H. Cooksey signed the attestation clause that appears on the second page of the will as signed by him. This clause is as follows:

> "I hereby certify that William Thomson, counsel at Southampton for the United States of America, attended before me this 25th day of February, 1886, and acknowledged the foregoing paper writing, contained in two sheets of paper, as his last will and testament, and that the signature of William Thomson at the foot thereof is in the proper handwriting of the said William Thomson.
>
> "(Signed) JOHN H. COOKSEY."

If this attestation clause had also stated "and that the witness signed in the presence of Thomson," then the contention of the plaintiffs in error would fall. But what law is there that requires an attestation clause, or what law is there that required John H. Cooksey to say that he signed his name in the presence of William Thomson? Counsel for the plaintiffs in error fail to cite any authorities to sustain any such contention; but begging the question, as it were, they said: "You have not proved that Cooksey signed it in

the presence of Thomson." Our answer to that was that Cooksey is dead, and that by proof of his handwriting on the attestation clause the law presumes that he signed it as the law required. The only case cited by plaintiffs in error on this question was the case in 2d Harrington, where the will was made in another jurisdiction which required less formalities than in the State of Delaware. The court held in that case that, under those circumstances, it would be necessary to produce the witnesses and prove the due execution of the will according to the law of the State of Delaware, the devisor being a citizen of Pennsylvania and the will being made in that State to convey property in both States. William Thomson was a citizen of the United States and, until he was appointed consul at Southampton, a resident of the District of Columbia, and there is no law in England which permits a witness to sign the will out of the presence of the devisor; so that the case in 2d Harrington can be of no avail to the plaintiffs in error.

Speaking of this question of the proper proof of the attestation of a will, the Supreme Court of the United States in the case of Robertson *vs.* Pickerel, say:

> "Its genuineness must be shown by the witnesses, if they are living, who attested its execution and heard the declarations of the testator as to its character, *and if dead, their handwriting must be proved.*"

If the contention of the plaintiffs in error was sustained, it would be utterly impossible, in the District of Columbia, to prove the due attestation of a will where the will was witnessed by each witness apart from the other, unless all of the witnesses survived the devisor, for if one were to die it would be utterly impossible for the other to testify as to the execution of the will by the deceased witness. Therefore, if any such contention were sustained, it would destroy the effect and efficacy of the Statute of Frauds and would write into this statute the words "that

the witnesses must sign in the the presence of each other." A leading case on this question is that of Fry's Will, 2 R. I. 88. In that case the will was made in Virginia and witnessed by three witnesses at Norfolk, Va. It was offered for probate in the courts of the State of Rhode Island, and it appeared that all of the witnesses were dead; their handwriting was proved and objection was made to the probate of the will on the ground that there was no proof of the due execution of the will according to the requisites of the Statute of Wills, and that there was no proof that the same was signed, sealed, and declared by the testator in the presence of the witnesses, and that they subscribed their names in the presence of the testator; the court, however, saying that there can be no doubt that whatever the statute requires to make the instrument valid in law as a will must be shown in some way by proof to have been done; and the question now raised involves not so much a consideration of what facts are to be proved as the mode in which they are to be proved. Then the court says:

> "But how is this to be proved when the witnesses called to attest the facts can not be had and are beyond the power of the party to produce from death or other cause. It is well settled that in such a case secondary evidence may be given; that secondary evidence is by proof of the handwriting of the witnesses, and though there is no evidence under oath that they subscribed in the testator's presence, or he in theirs, yet in all cases where the attestation clause signed by the witnesses states the facts, the law presumes the facts were as stated though nothing is sworn to except the signatures, and thus far counsel for the appellant conceives the law to be. Proof that the witnesses subscribed is proof that they signed in the testator's presence and he in theirs, but the counsel contended that nothing more is to be presumed from the fact of subscribing than what the attestation clause states. The first case upon this point is the case of Hand *vs.* James, 2 Com. R. 571. In this case the attestation clause omitted to state the signing of

> the witnesses to have been in the testator's presence. The witnesses were all dead, and the point was made that nothing could be presumed beyond what the attestation clause asserted. But the court overruled the objection and said that the witnesses were called to attest the execution of the will and they would presume all the requisites complied with, and that proof of the signatures of the witnesses was sufficient prima facie proof to go to the jury. In the case of Croft *vs.* Pawlet, 2 Strange, 1109, there was the same omission and the court held, upon the authority of Hand *vs.* James, the will proved by proof of the signatures of all of the witnesses sufficently to go to the jury for them to say whether it was done in the testator's presence, and whether all the requisites of the statutes were not complied with."

And this is just exactly what the trial court did in this case. The court permitted the will to go in evidence as prima facie proof of its due execution, and afterwards submitted the question of its due execution upon the instructions offered by the appellants themselves.

The court, at the instance of the plaintiffs, instructed the jury—

> "That the law of the District of Columbia requires that a devise of real estate, that is to say, a disposition of the same by will, shall be signed by the party making the will, and that the instrument shall be attested and subscribed in the presence of such party by three or four creditable witnesses or else it shall be utterly void and of no effect. The person who subscribes a will as a witness shall be satisfied from his own knowledge of the state of the testator's mental capacity, and that he is of sound and disposing mind and capable of executing a valid deed or contract. The copy of the instrument purporting to be the will of said Thomson has been admitted in evidence upon proof of the death of John H. Cooksey and proof that the signature to the certificate on the margin of the instrument is in his handwriting; but if upon the whole evidence you should find that John H.

Cooksey, in signing the certificate, did not intend thereby to become a subscribing witness to the instrument, and that the testator did not intend that the said Cooksey should thereby become a subscribing witness thereto, or if you should find from the whole evidence that the said Cooksey did not in fact sign the said certificate in the presence of the testator, then, and in either event, the presumption of regularity in the execution arising upon the face of the certificate and proof of Cooksey's death and handwriting is rebutted, and the execution of the said instrument is not sufficient in law, and your verdict should be for the plaintiffs; and in reaching a conclusion as to the intention of the said Cooksey in the premises, it is competent for you to consider, among other facts, the position of his signature, and attach such weight thereto as in your judgment it should receive."

And this instruction, as well as the admission of the will in evidence as prima facie proof of its due execution, is fully supported by the following authorities:

Chaffee *vs.* Convention, 10 Paige, 91.
Collins et ux. *vs.* Nichols, 1 H. & J. 399.
Collins et ux. *vs.* Elliott, 1 H. & J. 1.
Welty *vs.* Welty, 8 Md. 20.
Croft *vs.* Pawlet, 2 Stran. 1109.
Dean *vs.* Heirs of Dean, 27 Vt. 749.
Bennett *vs.* Taylor, 9 Vesey, jr., 381.
Carrington *vs.* Payne, 5 Vesey, jr., 404.
Sears *vs.* Dillingham, 12 Mass. 358.
Robinson *vs.* Brewster, 140 Ill. 649.
Woodruff *vs.* Hundley, 29 So. 98.
Adams *vs.* Norris, 23 How. 523.

It is really not necessary to go outside of the decisions of the Court of Appeals, D. C., to show that a will without an attestation clause passes real estate where all of the witnesses are dead. It is only necessary to cite to this court the Holt

will case, reported in 12 Appeals, page 552. There there was no attestation clause and all of the witnesses were deceased, and the will was proved by proof of the handwriting of the deceased witnesses.

This court has applied this rule again and again to the due execution of sealed instruments, and they have held that when a subscribing witness is dead, or can not be produced, proof of his handwriting is the next best secondary evidence.

Clark *vs.* Courtney, 5 Pet. 319.
Stebbins *vs.* Duncan, 108 U. S. 32.
Hanrick *vs.* Patrick, 119 U. S. 156.

But it is said that this certificate of Cooksey is not an attestation of a will, but the certificate of a vice-consul to a paper, and an abortive attempt was made to prove by the witness, young Wier, the manner in the United States consul's office at Southampton of executing papers, etc., and it was desired to apply the answer that he would give to show the manner in which Thomson executed the will before Cooksey. The court held that testimony inadmissible as not in any way relating to what took place when the vice-consul witnessed the will of Thomson. It is well-settled law that the mere fact that a witness to a will places a certificate thereon instead of the attestation clause, or instead of merely signing it without an attestation clause, can in no way affect the efficacy of his signing the same, and that he will be considered a witness although he signed it in his official capacity and placed his certificate thereto. As said by this court, in the case of Adams *vs.* Norris, 23 Howard, p. 367, in speaking of a will signed by a public officer and witnessed by two other witnesses:

> "We comprise among the witnesses to the will Ridley, the sindico (public officer). It does not appear that the sindico was charged with any function in the preparation or execution of testaments by the law or custom of California. Nor was it clear that the

> sindico in the present instance expected to give any sanction to the instrument by his official character. He attested the execution of the will, and we can not perceive why the description of himself, which he affixes to his signature, should detract from the efficacy of that attestation."

In this case all of the witnesses were dead, and the law of California at that time required stricter formalities for the proper execution of a will than the Statute of Frauds. And the court in that case left the question as to whether or not the parties who appear to be witnesses were witnesses to be decided by the jury from all the evidence in the case just as the court in this case, upon request of the plaintiffs in error, left the question to the jury to show whether or not John H. Cooksey was a witness to the will of Thomson, and whether or not there was due execution of the will as to the said Cooksey.

See, also, the following authorities:

> Murray *vs.* Murphy, 39 Miss. 214.
> Frank *vs.* Chapman, 64 Tex. 159.
> Payne *vs.* Payne, 54 Ark. 415.

The Court of Appeals of the District of Columbia, in considering this case, after examining the assignment of errors therein, said:

> "We think that there is only one substantial question in the case for our consideration, and that is the question of sufficiency in law of the attestation of the will of William Thomson as a conveyance of real estate in this District. . . . We think that the question is solved for us by the doctrine stated by the Supreme Court of the United States in the case of Adams *vs.* Norris, 23 How. 353. The case, it is true, arose in California under the Mexican or Mexican-Spanish adaptation of the Roman civil law then in force in that part of our Union, but the rule laid down by the court is of general application."

Another contention raised against the admission of the will in evidence is that there is a discrepancy between the certified copy and the original will, in that the original will is signed by Thomson on two pages, and the certified copy does not show such signing.

In the case of Cornet *vs.* Williams, 20 Wall. 26, the certified copy had the word *sixty*-six dollars instead of *thirty*-six dollars, and the court held that that did not destroy the efficacy of the certified copy, because it was shown that thirty instead of sixty was correct, and that there was a mistake in the copy. In this case the witnesses identified the certified copy offered in evidence as being a copy of the original will. They compared it with the original at the place where the original was in custody, and they went there for the sole purpose of making the comparison, and the mere fact that there is a mistake of this kind is easily shown by an examination of the certified copy, which shows that it was not copied in two sheets as the will was originally written. Plaintiffs in error certainly waived this objection when they themselves, on page 49 of the record, offered in evidence a copy of the will of William Thomson which is identical with the copy offered in evidence by the defendants in error. The copy offered in evidence by the plaintiffs in error coming from the State Department and being a certified copy from the principal registrar of Probate, Divorce, and Admiralty Division of the High Court of Justice, and certified to by Charles J. Middleton, registrar of the court, and the fact that the said Middleton is registrar being certified to by Thomas M. Waller, consul general of the United States at London.

It is therefore contended that not only did the trial court commit no error in permitting the several witnesses, heretofore referred to, to testify, but that no error was committed in admitting in evidence the will and testament of William Thomson, jr.

We desire to call the court's attention to the fact that the

plaintiffs in error, in excepting to the admission of the certified copy of the will in evidence, objected to the same on the ground that it was not properly certified as required by law, not proven properly to be a copy of the original papers, and not proper and competent evidence of a will of real estate; that the original will should be produced, and that the alleged will had not been proven to be executed in accordance with the law of the District of Columbia so as to admit it as evidence of a will of real estate for want of proper attestation, and for the further reason that it appeared that there was a duplicate will, and that the duplicate should be produced; and that it was not shown to have been signed by said Thomson, the one purporting to have been signed by him having been signed and executed at the foot of each page; also upon the ground that the testator, at the time of executing it, was of unsound mind, and that the alleged paper was obtained by undue influence. It being the duty of the plaintiffs in error to point out to the defendants the exact ground of their exceptions, the law says that when they so point them out they can not afterward raise any other objection. In other words, if there were any other objections to the admission of this will in evidence, they can not now be raised by the plaintiffs in error, for by failing to disclose any of the objections other than that set out in the record they have waived them. As far as the objection goes to the proper proof of the contents of the instrument, they have also waived that, because they themselves offered in evidence a certified copy of the same will; so that as far as the contents of the paper are concerned it is admitted by plaintiffs in error themselves to be exactly as set out in the certified copy offered by the defendants in error. No attempt was made to offer a certified copy, although the copy offered was certified, but the certified copy offered was also an examined copy and compared by the witnesses with the original will. It was fully proven to be a copy of the original, and the original will was fully proven to have been

duly executed in accordance with the law of the District of Columbia. No evidence was offered to show that defendants had in their possession the duplicate copy, and therefore it is insisted that in their objections plaintiffs in error set up no reasons why the will should not be admitted in evidence.

Although there was no objection contained in the record to the admission of the will on the ground that we should have proved that the law of England prohibited the bringing of the will to this country, nor was there any specific assignment of error for that reason, still in the brief of the plaintiffs in error it is contended that defendants in error should have proved that the law of England prohibited the the bringing of the original will to this country. As defendants in error were never placed in a position where any such question was raised in the trial court, and as the document was out of the jurisdiction, and for that reason, under the authorities secondary evidence was permitted, the plaintiffs in error have no right to raise this contention at this time.

On the question of the plaintiffs being bound by the reasons stated in their objections, we desire to call the court's attention to the fact that it is well-settled law, as just stated, that a person is bound by the grounds of objection set up by him, and can not argue any new grounds in the appellate court. Thus the objection that the registered copy of a deed was not admissible in evidence without notice to produce the original is waived by placing the objection to its admission on other grounds at the trial, and the question of failure to give notice to produce the original can not be raised as an objection in the appellate court.

Commonwealth *vs.* Mead, 153 Mass. 284.
Gilbert *vs.* Fay, 4 App. D. C. 40.
Noonan *vs.* Caledonian Mining Co., 121 U. S. 400.
Wood *vs.* Wimer, 104 U. S. 786.
Smith *vs.* Bean, 46 Minn. 138.

Second. We now come to consider those exceptions and assignments of errors that are contained in the record and

pertain to the ruling of the court in excluding certain evidence offered by the plaintiffs in rebuttal.

And under this head we will consider the seventh, eighth, ninth, tenth, eleventh, and twelfth assignments of error. The Court of Appeals, in speaking of the contentions attempted to be raised upon these exceptions and assignments of error by the plaintiffs in error, say (Rec. p. 140):

> "As we have intimated, it would subserve no good purpose and we do not deem it necessary to enter into any elaborate consideration of the other assignments of error or of the exceptions upon which they are founded. They raise no questions of law that have not been fully settled by the authorities.
>
> "For example, to the general interrogatory appended at the conclusion of the commission sent to take the testimony of Septimus Cooksey, son of John H. Cooksey, in England, and which is the usual interrogatory in all such cases, whether the witnesses could state anything else pertinent to the issues between the parties, the witness, whose previous testimony had been addressed exclusively to the proof of his father's signature to the certificate annexed to the will, here said that he recollected the occasion when William Thomson came to see his father about his will, and that at that time, as far as the witness could judge, Thomson was perfectly sane and in good health. Exception was taken to the admission of this interrogatory and answer; but plainly the question was proper and the answer was relevant to the issue. The plaintiffs do not claim to have been surprised by either, but only to have had no opportunity for cross-examination. But no doubt the opportunity would have been afforded if application therefor had been duly made.
>
> "Similarly interrogatories were propounded to the register of the probate court in London, who had the official custody of the will of William Thomson among other wills, and he was requested to state whether it was on file in his office, whether it had been admitted to probate, whether the Cooksey certificate appeared on it, what the contents were of this

certificate, and whether a certified copy of the will which was attached to the interrogatories was a correct copy of it. To the allowance of each and all of the questions and of the answers of the witness to them exception was reserved by the plaintiffs, and these exceptions have been brought here by assignments of error thereon. But it is well settled that this is the proper mode for the proof of documents and their contents when the documents themselves are beyond the jurisdiction of the court.

"In the testimony of the plaintiffs in rebuttal it was sought to introduce testimony plainly of a hearsay character, including the certificates of the physicians for the commitment of William Thomson to the insane asylum; but insanity is not to be proved in this way, and these certificates were clearly inadmissible, especially in view of the fact that it does not appear why the testimony of the physicians themselves might not have been taken. So, also, declarations made to some of the witnesses by third parties were also excluded. And this, of course, was evidently proper. Neither in the matter of the exclusion or admission of testimony, nor in the matter of the instructions which were given or rejected, or given with a modification, do we find any reversible error. The rulings of the court were eminently right and just throughout the whole trial."

On page 28 of the record, in answer to the 15th interrogatory, the court excluded the statement of Dr. Scott, the witness attempting to recite what he said, and in answer to the 17th interrogatory the court excluded the words "as my mother would not let me go near him;" and on pages 30 and 31 of the record the court excluded the answer to the question, "Who had charge of Mr. Thomson's affairs after he was sick?" the answer reading as follows: "I telegraphed to old lady Thomson against Mr. Thomson's wishes, saying that the wolves will be here in time." It is hardly necessary to cite authorities to show that these statements that are here excluded are not admissible on the ground that they are hear-

say and purport to state, not what the witness himself knows, or not what the witness himself can testify to as of his own knowledge as to the condition of Mr. Thomson, but what some one else said to the witness or what he (the witness) said to some one else. The answer to the 34th interrogatory should also have been excluded on the ground that it was no answer at all to the question put to the witness, and the latter part of it could not be offered as a declaration of Mr. Thomson, because it does not purport that he made the statement, or if he did make such statement, it would not be admissible under any of the issues in this case, it being a well-known principle of law that declarations of the testator of undue influence, if the statement could be so construed, are not admissible to establish that fact. The refusal of the court to permit William A. P. Lane, a solicitor of the High Court of Justice of England, to testify as to the substance of a book produced in order to apparently show what was the law of England in regard to incarcerating persons in insane asylums is also alleged as error. The counsel for the plaintiffs in error offered the testimony, as he stated, for the purpose of getting in evidence the declarations of Cunningham in order to show undue influence exercised by Cunningham over William Thomson in the making of the will offered in evidence; that the declarations of Cunningham to show undue influence would not be admissible in this case is well settled by this court in the case of Ormsby *vs.* Webb, 134 U. S. 47. The trial court, however, did not rule out the testimony of the witness, but merely stated that the copy of the statute produced was an imperfect copy, and an examination of the record from pages 31 to 35 will show that the court never ruled that the witness Lane could not testify as to what the law of England was in regard to the incarceration of a person in an insane asylum. The question put to the witness was: "Now, what are the conditions of entrance of a patient—the receipt of a patient in an asylum?" And this question

was objected to on the ground that if the evidence was statutory it should be produced, and on the further ground that it is incompetent and immaterial to show how William Thomson was sent to the asylum.

Thereupon an alleged copy of the English law was produced, and the court said: "This copy does not seem to contain all that has been referred to; it is an imperfect copy," and then counsel for the plaintiffs in error went off to argue the question of the certificates and the question of undue influence, and seemed to have forgotten all about the witness on the stand, or what was the last question that was put to him. The witness was permitted to withdraw from the stand, although the court stated that if the counsel for the plaintiffs in error had any more questions to ask the witness they had better present them and let the court pass upon them.

The materiality of this evidence will be considered in considering the exception which refers to the refusal of the court to admit in evidence the copy of the application of Cunningham for the admission of Thomson to the asylum and the copies of the medical certificates attached thereto. These papers appear on pages 40 and 41 of the record. The question of their admissibility is raised in the deposition of Dr. Manning, and he was asked to produce the papers that he had—not in order to show that he had William Thomson, jr., in his asylum, which was already fully proved and not disputed, but merely to show what were the contents of the papers. Why such evicence was desired the record fails to disclose, except in the colloquy between counsel and court, on page 35, where the counsel informed the court that he desired to get these papers in evidence in order to show the undue influence of James E. Cunningham. An examination of the papers will show that they are written hearsay testimony of three persons, J. E. Cunningham, William Aitken, M. D., and George Scott, M. D., and that in the statements of the last two mentioned persons they, themselves, refer to matters that are,

as to them, mere hearsay. Upon what authority such papers are admissible in evidence counsel for the defendants in error are at a loss to understand. No authority was cited by the plaintiffs in error to sustain any such ridiculous contention. It was not contended by plaintiffs in error nor can it be contended, that these certificates which they attempted to offer in evidence establish a status, but that they are mere ex parte statements of persons who made the same without any knowledge of William Thomson, jr., and that he was by such papers incarcerated merely for the purposes of having proper care taken of him during his temporary insanity. A case directly in point is that of Leggate *vs.* Clark, 111 Mass. p. 308. In that case the question involved was the insanity of a man and whether or not he was insane at the time he, with his wife, executed a certain deed. The court held that such a deed under the statutes of that State was void and not merely voidable. And in order to prove his insanity there was admitted in evidence an order of the judge of probate committing the party to a lunatic asylum. The court, speaking of the admission of this evidence, states:

> "But we are of the opinion that the presiding judge erroneously ruled that the order of the judge of the probate committing Leggate to the insane hospital was admissible and prima facie evidence of his insanity. The question before the judge of probate was different from the issue in this case. The proceedings before him were under the statute of 1862, C. 223, section 3, which authorized judges of probate to commit to either of the State lunatic hospitals 'any insane person who, in his opinion, is a proper subject for its treatment or custody.' The issue before the jury was whether Leggate was of sufficient mental capacity to give an intelligent assent to his wife's conveyance of real estate. A man may be a proper subject for the treatment and custody of a lunatic hospital, and yet have sufficient mental capacity to make a will, to enter into contracts and transact business, and to be a witness. The order of the judge

> of probate was in a proceeding to which the tenant was not a party, and as to which he had no opportunity to be heard, and was upon an issue different from the issue on trial. The demandant contends that it is analogous to an inquisition of lunacy or a decree of a judge of probate appointing a guardian of the insane person, and therefore admissable against strangers. . . . But an order under the statute is not of this character; it does not pretend to declare the person committed to the hospital to be incapable of transacting business; it does not take from him the care and management of his estate. It affords a justification for the restraint of his person, but is is not designed to fix his status. We think the *admission of the order* of the judge of probate and the ruling as to its effect *were erroneous.*"

It has generally been held that certificates of a character like the one here offered are not admissible in evidence.

> Conyer *vs.* Boyd, 55 Ind. 166.
> Erickson *vs.* Smith, 38 How. Prac. 455.
> Shumway *vs.* Leackey, 67 Cal. 458.
> Com. *vs.* Heffner, 102 Mass. 148.
> Sewell *vs.* Sewall, 122 Mass. 156.
> Prigg *vs.* Lansburgh, 5 App. D. C. 30.
> Thomas *vs.* Ben. Co., 10 Appeals, 277.
> Snell *vs.* United States, 16 Appeals 517.
> Greenleaf on Evidence, secs. 493–498.
> State, use of Grice et al., *vs.* County, 54 Md. 426.
> Insurance Co. *vs.* Lewin, 24 Col. 43.

The next question to be considered is the refusal of the court to permit the witness Weir to answer the question—

> "Now, state whether or not, under the general form and custom of the office, Mr. Cooksey certified the papers stating that the party who acknowledged it was present when he was not present?"

This question was objected to on the ground that the witness had no knowledge whatever of Mr. Cooksey's manner of certifying papers, and also on the ground that his manner of certifying ordinary papers was immaterial to the issues here involved. The witness testified that as far as he knew the vice-consul did nothing, and that he never saw a will or deed at the office; that he saw papers, but did not know their contents, and that he never heard of anybody acknowledging a will before Mr. Thomson, nor did he ever know of any one going in and acknowledging a deed. That the papers he knew about were merely presented by people coming in for signatures, and that he was only familiar with what was done in the office of the consul, and that he was not familiar with the custom of the vice-consul signing certificates. He was asked the further question—

> "Do you know of Mr. Cooksey having signed a certificate of this character to papers without having the party signing it present?"

to which question objection was made, and the court sustained the objection because the witness had no knowledge of the contents of any of the papers that he referred to and *no knowledge* as to Cooksey signing papers. The object of this testimony was apparently to show that Mr. Cooksey was in the habit of certifying to certificates of the same character as the will of William Thomson when not in the presence of the person who signed the same. The whole evidence of the witness shows that he possessed no knowledge that qualified him to answer the question, and not having any knowledge, of course any answer that he would have given would have been mere guesswork, and the trial court was certainly right in refusing to permit this witness, who was an interested witness in the case, to testify as to the custom of Mr. Cooksey when he himself admitted that he had no knowledge of any actions of Mr. Cooksey.

3. We come now to consider the assignments of error which involve the exceptions taken to the action of the trial court in granting certain prayers of the defendants in error, and in refusing to grant certain prayers of the plaintiffs in error.

Before taking up and considering this question, we desire to call the court's attention to the fact that no exceptions whatever were noted to the charge of the court, and that after the court charged the jury in a way, we must insist, exceedingly favorable to the plaintiffs in error, the attorneys for the plaintiffs in error were so pleased with the charge that they stated in open court, before the jury, *that they had no exceptions.* They come now, however, and insist that, on account of the fact that the court read in its charge certain prayers and refused to read into his charge certain other prayers, they were injured thereby. It is a well known principle of law that the refusal and rejection of prayers by a court is never error, if the court properly charges the jury as to the law in the case; and we respectfully submit that from the standpoint of the plaintiffs in error the court stated to the jury the law as it should be stated; for, as before mentioned, their counsel arose in the presence of the jury and stated to the court *that they had no exceptions to the charge.*

The first objection is to the second prayer of the defendants in error. This prayer involves the question of estoppel. The record shows that Thomas Haig and William Thomson Weir received under the will which is here in question certain legacies and bequests, amounting in all to about $45,000. The court, by this prayer, adopts the well-known principle of estoppel, and says to them that you can not take with one hand and rob with another. This is so well established as a general principle of law that we will merely cite a few authorities on the question. The principle of law being that where a person is cognizant of the facts surrounding the making of a will, and knows his legal rights and receives a

benefit under the will, he can not attack the will unless he makes some restoration of the benefits received. The witness Weir, on the stand, admitted that he had received money under the will, and said that he was after all that he could get, and there is no offer in the pleadings or proof in the evidence to show when these persons gained knowledge of facts which cause them to try and take from their cousins this property, or that they ever tendered back what they had received. Therefore, they are estopped.

Fisher *vs.* Boyce, 81 Md. 53.
Farmington Savings Bank *vs.* Curran, 72 Conn. 342.
Watson *vs.* Watson, 128 Mass. 155.
Latrobe *vs.* Carter, 83 Md. 287.
Cunningham's Appeal, 153 Penn. St. 397.

But another and conclusive answer to this exception and assignment of error on this prayer is that the jury never had to consider the question of estoppel, because they found from the evidence there that the will was properly executed, and that there was no undue influence or testamentary incapacity, and therefore it was never necessary for them to consider the question of estoppel. If they had found the will properly executed, and undue influence or want of testamentary capacity, then it would be necessary for them to apply the principal of law here laid down. The other prayer of the defendants in error is exactly in accord with the authorities cited on the question of the admission of the will in evidence. It leaves to the jury the question of fact as to whether or not the will was duly executed, and also leaves to the jury the question of testamentary capacity and undue influence. The fourth, sixth, seventh, and eighth prayers, with the exception of the latter part of the seventh prayer, lay down well-known principles of law that are to be found in all cases involving the testamentary capacity of a devisor, or of undue influence as to the making of a will, and

it is only necessary to cite the following cases to show that these prayers contain those well-known principles:

Davis *vs.* Calvert, 5 G. & J. 173.
Barbor *vs.* Moore, 4 App. D. C. 535.
Barbor *vs.* Moore, 10 App. D. C. 30.
Olmstead *vs.* Welb., 5 App. D. C. 38.

On the motion for a new trial the only exception in regard to the prayers that was argued before the trial court was the exception taken to that part of the seventh prayer which reads as follows:

> "They are instructed that there is no evidence in this case of *any opinion* of any non-expert witness that William Thomson was, at the time he made the said will, incapable of making a valid deed or contract, nor was there any statement of any non-expert witness as to the mental incapacity of William Thomson *to make a valid deed or contract at the time said will was executed.*"

In the Court of Appeals the seventh prayer, except the part here set out, was not questioned and no objection was made thereto, nor was any objection made to the prayer as a whole, but it was insisted that the part here quoted was not supported by the evidence. No such objection appears in the bill of exceptions.

The exception in the record is a mere general exception and does not point out any reason why the prayer was not proper. Can it be contended that this court can look into the facts of the case to determine whether or not the trial court was correct in granting this prayer? The record does not contain the facts of the case, and it is insisted, upon an examination of the record as it is here, that there is no evidence of any *opinion* of non-expert witnesses, nor was there any statement of any non-expert witness as to the mental incapacity of William Thomson to make a valid *deed or contract* at the time said will was executed. The only witnesses examined by the plaintiffs in error were

the office boy and the servant, and counsel were careful not to ask either of them whether or not at the time that this will was executed William Thomson was of sound mind, or whether or not at the time of the executing of the said will *they were of the opinion that William Thomson was incapable of making a valid deed or contract.* And therefore the trial court, in granting the prayer, committed no error, but merely told the jury exactly what the facts were, and one of the counsel for the plaintiffs in error, in arguing the motion for a new trial, admitted that this statement of the court was technically correct.

In his charge the trial court qualified this prayer somewhat and cautioned the jury that it did not mean that there was no evidence in this case which it was not proper for them to take into consideration in reference to the question of whether William Thomson was not of unsound mind at the very time he executed the will. The trial court further said:

> "Evidence has been introduced of non-expert witnesses as to his condition of mind at and previous to the execution of the will, and the fact, which does not seem to be disproved at all, that he was insane before the time of the execution of the will and was taken to a private asylum and kept there for a time, disclosed by the evidence, and therefore that is competent testimony to be taken into consideration in reference to the matter."

And the court then informed the jury that he would have something further to say about that question, which he did say in the prayers of the plaintiffs in error, by permitting them to consider the question of whether or not the insanity proven in the case was permanent insanity.

Before leaving this question of the exceptions taken to defendants' prayers, we desire to call the court's attention to the fact that the plaintiffs in error contended, really without any evidence to support such contention, that there was evidence in the record of permanent insanity on the part

of William Thomson, and that this changed the burden of proof. The court, in granting the fourth prayer of the plaintiffs in error, submitted this question to the jury. In his fourth prayer, which is contained in the charge of the court, the court said:

> "If you find from the evidence that within two or three months prior to the date of said instrument, namely, February 24th, 1886, the testator was insane or of unsound and impaired mind, and not capable of making a valid deed or contract, *and that such insanity was permanent in its nature and character, the presumptions are that such unsoundness of mind continued*, and it, in such case, is upon the defendants claiming under the will to satisfy you by a preponderence of the evidence that at the time of the execution of the will he was of sound and disposing mind, capable of executing a valid deed or contract."

This would seem to have left the question of permanent insanity to the jury, and if they so find, to have changed the burden of proof.

We come now to consider the errors assigned in refusing to grant certain prayers of the plaintiffs in error, and the first one to consider is the refusal of the court to grant the fifth prayer, on page 60, and in granting in lieu thereof the fifth prayer, on page 72. An examination of the two prayers would disclose the folly of the futile attempt to thrust upon the jury any such statements as set out in the fifth prayer. The fifth prayer, as it appears to us, finds facts to exist which do not exist in the case; asks the jury to become experts in determining the question of the mental capacity of the party, and also calls the jury's attention to particular parts of the evidence which were offered, and attempts in a manner not warranted to draw a distinction between the testimony of several witnesses who testify in the case. The prayer also calls upon the court to tell the jury that persons of unsound mind even succeeded in controlling their action to such an

extent that all of their outward appearances are rational, and even their malady is not only successfully concealed from non-professional observers, but from the experienced eye of physicians. There was nothing in this case that called for such a remarkable statement for the court to make to the jury, and the court very properly instructed the jury by granting in lieu thereof the prayer number 5, on page 72.

Just why the eighth prayer was offered the record fails to disclose; whether or not there was or was not evidence tending to show the facts which it was attempted to eliminate by that prayer is nowhere disclosed by the record. The prayer was apparently offered on the part of the plaintiffs in error for the purpose, if possible, of getting out of the case what they knew to be wrongful. Indeed, on all of the testimony in this case, as it appeared in the court below, the court might well have been warranted in refusing the prayer on the ground that it was contrary to the testimony, for the court might well have thought from the testimony in the case that the whole matter was an attempted steal on the part of the plaintiffs in error and might have refused the prayer on that ground. The record not disclosing the whole evidence in the case, it would be utterly impossible for this court to find error in the ruling of the court below, for it might also have been refused on the ground that there was no testimony to support.

An examination of the charge of the court will disclose the fact that this case was submitted to the jury in a way most favorable to the contentions of the plaintiffs in error and an examination of the charge will show that no error of law was committed by the court, and that no error of law was alleged by the plaintiffs in error to have been committed by the court in submitting the case to the jury. It is a well-known principle of law that even if plaintiffs in error had excepted to the charge, in their exceptions they would have to point out to the court the errors in the charge; and a mere statement on

their part that they excepted to so much of the charge as was at variance with the prayers requested by them would be too vague and general to entitle them to a consideration of such exception in an appellate court. How, then, can the plaintiffs in error ask the court to consider the alleged exceptions taken by them to certain prayers when they have acquiesced in the charge and not attempted to allege any error therein, but, as stated to the court in the presence of the jury, they have no exceptions to such charge. If a party can not reserve his rights by objecting to so much of the charge as is at variance with the prayers requested by him, how can he claim a right to criticise prayers refused or granted when he fails in any way to criticise the charge or to set up any specific objections to the prayers refused or granted.

Beaver *vs.* Taylor et al., 93 U. S. 55.

Another principle of law is well settled, that all instructions must be taken together, and if when taken together in the charge they properly state the law, an exception to one would be of no value.

District of Columbia *vs.* Haller, 4 App. D. C. 405.

Again, nothing is better settled than it is in the discretion of the court to refuse all instructions prayed for by either party and to state the law in its own language, and if it does so and states properly the law of the case, then no error can be assigned for not granting or refusing particular prayers.

Carpenter *vs.* Railroad Co., 3 Mack. 225.
Jackson *vs.* Railroad Co., 6 Mack. 232.
District of Columbia *vs.* Wilcox, 4 App. D. C. 90.
Travers *vs.* United States, 6 App. D. C. 450.
Rio Grande R. R. Co. *vs.* Leak, 163 U. S. 280.

While not desiring to be over technical in considering the record in this case, we feel it our duty to call the court's attention to the fact that with the exception of one or two exceptions taken in this record, there is absolutely no ground given or reasons stated why the plaintiffs in error except, and we know of no principle of law better settled than that when exceptions are reserved to the rulings of the trial court on the evidence or prayers looking to a review of such rulings on writ of error, there should be such a statement in the bill of exceptions as is necessary to make intelligible the point or decision wherein the court is supposed to have erred, and nothing should be left to surmise and conjecture; and where the bill of exceptions fails to show the grounds upon which the counsel contend the court erred in its rulings, or to point out to the court wherein there is error, the matter can not be reviewed on writ of error.

Moore *vs.* Bank of Metropolis, 13 Peters, 302.
Northern Pac. R. R. *vs.* Charles, 51 Fed. Rep. 362.
De Forrest *vs.* United States, 11 App. D. C. 458.
Milliken *vs.* Mand, 110 Ala. 332.
Young *vs.* Martin, 8 Wallace, 354.
Insurance Co. *vs.* Lea, 21 Wall. 158.
District of Columbia *vs.* Woodbury, 136 U. S. 450.
Woodbury *vs.* District of Columbia, 3 Mackey, 127.
Prindle *vs.* Campbell, 18 D. C. 598.
Hazleton *vs.* Le Duc, 10 App. D. C. 381.
Noonan *vs.* Caledonian Co., 121 U. S. 400.
Bell *vs.* Sheridan, 21 D. C. 370.

The record from pages 73 to 130 shows certain proceedings had in an attempt to obtain a new trial. While this question was argued in the Court of Appeals, no error was assigned on this ground, the plaintiffs in error no doubt conceding the law to be that this court never inquires into the question of whether or not the lower court erred in refusing or granting a new trial, and therefore do not wish to

argue the question before this court. We desire, however, to call the court's attention to the affidavits therein set out, in order to show to what length plaintiffs in error have gone in this case to try to defeat the defendants in error. The bad faith of the plaintiffs in error in attempting to argue to the Court of Appeals and to this court that the will set out in the bill of exceptions, as well as the certificate of Cooksey, is not the will and certificate referred to in the depositions taken by the defendants in error, compels us to refer to these affidavits. These affidavits, as well as the contention of the plaintiffs in error in regard to the exhibits accompanying the deposition, certainly show that plaintiffs in error have no merit whatever in their case, but are attempting, by means fair or foul, to rob the defendants in error of their verdict and judgment.

It is to be noted on page 130 that the charge of the court and the remarks made by counsel at the end thereof were inserted in the bill of exceptions at the request of the defendants and over the objection of the plaintiffs. In defense of our requiring the charge of the court and the statement of counsel at the end thereto, we desire to say that we only ask this court to hear the questions of law as they were heard in the trial court; that we have nothing to conceal, nothing to keep out of the record, but we believe that it would be unheard of to bring this case here with the general objections of the plaintiffs in error to the prayers as contained in this record and leave out the charge of the trial court. In fact, we are aware of no practice that would warrant any such proceedings.

We respectfully submit that the record shows no error and that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

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